92-946

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER, 1992, Term

OSCAR LEE WILKINS, Plaintiff/Petitioner,

VS.

BURLINGTON NORTHERN RAILROAD COMPANY,
Defendant/Respondent.

Petition for Writ of Certiorari

To the District Court of Appeals, First District,
State of Florida.

PETITION FOR WRIT OF CERTIORARI

JAMES F. SCHAEFFER, JR.
5108 Stage Road, Suite 2
Memphis, Tennessee 38134
Telephone: (901) 382-1212

COUNSEL FOR PETITIONER

ISSUES FOR REVIEW

Whether the District Court of Appeals for the First District, State of Florida, erred in affirming, by a per curiam order, the Trial Court's entry of Judgment N.O.V. not withstanding the jury verdict in favor of the Plaintiff in this Federal Employer's Liability Act (45 USC Sec. 51, et seq) action and its award of damages in the amount of $450,000.00?

TABLE OF CONTENTS

Page

Jurisdiction 1

Federal Statutes 1

State Rules 1

Statement of Case 2

Argument 3

Conclusion 5

Appendix 7

A. Final Judgment for Defendant

B. Order of Court of Appeal Affirming

C. Order of Court of Appeals Denying Rehearing

TABLE OF AUTHORITIES

Page

FEDERAL AUTHORITIES:

Statutes:

28 USC. 1257 (a) 1
45 USC. 51, et seq 1

Decisions:

Bailey v. Central V.R., Inc.
(1943) 319 U.S. 350, 87 L.Ed. 1444, 62 S.Ct. 1062 4

Chicago, M & S P.R. Company v. Coogan
(1926) 271 U.S. 472 &0 L.Ed. 1041, 46 S.Ct. 564 5

Dickerson v. Franklin N.A.T. Ins. Company
(1942 CA 4 W.Va.) 130 F2d. 35 5

Howes v. Great lake Press Corp
(1982 Ca 2 N.Y.) 679 F.2d. 1023 5

National Car Rental System v. Better Monkey Grip Company,
(1975 CA TX) 511 f.2d. 724 5

Rogers v. Missouri R.R. Company
(1957) 352 US 500, l L.Ed.2d 493, 77 S.Ct. 443 4

St. Louis R. R. Company vs. Ferguson
(1950 CA 8, Mo.) 182 F2d. 949 4

Shelton v. Thomson
(1946 CA 7 Ill.) 157 F.2d. 709 5

Sparrow v. Yellow Cab Co
(1956) CA 7, Ill.) 273 F.2d. 1 5

Union P. R. Company v. Huxol
(1918) 245 US 535, 62 L.Ed. 455, 38 S.Ct. 187 5

Urie v. Thompson
(1949) 337 US 163, 93 L.Ed. 1282, 69 S.Ct. 1018 5

Webb v. Illinois C.R. Company
(1957) 352 US 512, 1 L.Ed.2d 503, 77 S. Ct. 451 5

Wilkerson v. McCarthy
(1949) 336 US 53, 93 L.Ed. 497, 69 S. Ct. 413 4

Court Rules:

Supreme Court Rule 10.1 (b) 1

STATE AUTHORITIES:

DECISIONS:

Alabama and V.R. Company v. Fountain
(1927) 145 Miss. 515, 111 So. 153 4

COURT RULES;

Florida Rules of Appellate Procedure 9.030 1
Florida Rules of Appellate Procedure 9.120 2

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Supreme Court Rule 10 1 (b) and 28 USC 1257 (a), in that the District Court of Appeal, First District, State of Florida, entered a Per Curiam Order on June 1, 1992, and denied Petitioner's Motion for Rehearing on July 2, 1992, affirming the Final Judgment for Defendant entered by the Circuit Court of Escambia County, Florida, on July 1, 1991. No appeal lies from a Per Curiam order of the Court of Appeal to the Florida Supreme Court.

FEDERAL STATUTES

Federal Employers Liability Act, 45 USC Sec. 51, et seq.

STATE RULES

Florida State Rules of Appellate Procedure, Rule 9.030, Jurisdiction of Courts (a), Jurisdiction of Supreme Court.

* * *

2. Discretionary Jurisdiction. The Discretionary Jurisdiction of the Supreme Court may be sought to review:

A. Decisions of District Courts of Appeal that:

(i) Expressly declare valid a state statute;

(ii) Expressly construe a provision of the State and Federal Constitution.

(iii) Expressly affect a class of constitutional or state officers;

(iv) Expressly and directly conflict with a decision of another District Court of Appeal or of the Supreme Court on the same question of Law;

(v) Pass upon a question certified to be of great public importance.

(vi) Are certified to be in direct conflict with decisions with other District Courts of Appeal.

Rule 9.120 Discretionary Proceedings to Review Decisions of District Courts of Appeal (a) applicability. This rule applies to those proceedings which invoke the discretionary jurisdiction of the Supreme Court described in Rule 9.030 (a)(2)(A).

STATEMENT OF THE CASE

The Plaintiff/Petitioner, Oscar Lee Wilkins, had been employed by the Defendant/Respondent, Burlington Northern Railroad Company, since 1970, as a machinist. On October 21, 1987, the Plaintiff was attempting to turn a valve which was sticky and malfunctioning. This valve controlled the flow of fuel from a fuel tank through a pump and hose. The valve broke. The resulting, violent twisting caused him to suffer ruptured discs in his lower back. The proof at trial showed that the Defendant had installed the valve several years prior to the incident and at no time during that time ever inspected or made any repairs to the valve. The Defendant, Burlington Northern Railroad Company, failed to post any instructions as to the operation of the valve or pumping system and failed to train its employees, such as the Plaintiff in the proper use and/or maintenance of the valves.

Plaintiff filed his Complaint in the Circuit Court of Escambia County, Florida, and in that Complaint alleged the grounds necessary for an action brought pursuant to the Federal Employers Liability Act, 45 USC 51, et seq. The trial of the cause commenced before the Honorable Lacey A. Collier, Judge, on April 10, 1991, and continued thereafter for two (2) days, at which time the jury announced it had reached a verdict in favor of the Plaintiff awarding total damages in the amount FIVE HUNDRED THOUSAND AND NO/100 ($500,000.00) DOLLARS, and finding that the Plaintiff was five (5%) percent contributorily negligent with a result that a verdict was rendered in favor of the Plaintiff against the Defendant in the amount of FOUR HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($475,000.00) DOLLARS.

On June 25, 1991, the trial court entered a Final Judgment for Defendant, said Order being officially entered on the record on July 1, 1991. In this final Judgment the trial court held that the Plaintiff had failed to establish any negligence on the part of the Defendant which resulted in injury to the Plaintiff.

The Plaintiff appealed this decision to the District Court of Appeal, First District, State of Florida, which entered a Per Curiam Order

on June 1, 1992, affirming the trial court's Order. A Petition for Rehearing was filed on June 15, 1992, which was denied by the District Court of Appeal on July 2, 1992.

Under Florida laws, the per curiam affirmance of the trial court's decision effectively denies jurisdiction for any further appeal to the Florida Supreme Court. That Court is empowered to grant a discretionary appeal only in cases where the District Court of Appeal has rendered an opinion. Since no opinion was entered by the District Court of Appeal for the State of Florida, no jurisdiction, discretionary or otherwise, lay to the Supreme Court of Florida. Thus, the only further review available to the Plaintiff/Petitioner, Oscar Lee Wilkins, at this stage of the proceedings, is to the United States Supreme Court.

ARGUMENT

In granting Judgment N.O.V. for the Defendant, Burlington Northern Railroad Company, in this cause, the trial court erred in invading the province of the jury.

The Plaintiff proved in the trial of this cause that he injured his back while attempting to turn a valve which would increase or decrease the flow of fuel through a pump and hose. The fuel was used to operate locomotives and other track vehicles owned and operated by the Defendant.

The valve in question was operated by grasping the handle and squeezing it to release a trigger. Apparently, the valve had a type of ratchet system. The valve stuck and then the Plaintiff applied additional pressure with the result that a one-half (1/2") inch steel pin shattered. This resulted in a violent twisting motion to the Plaintiff causing serious injury to his back.

The lone service man whose responsibility it was to inspect and repair this valve was located in Birmingham, Alabama. The Plaintiff worked at the Defendant's yard at Pensacola, Florida.

No one ever instructed the Plaintiff in how to operate the valve or pump system, even though it was his job to operate it. In fact, the Plaintiff's alleged immediate supervisor was not even employed in the Pensacola yard. This supervisor worked at the Defendant's yard in Birmingham, Alabama. For some inexplicable reason, this supervisor would communicate with the Plaintiff through a separate individual who was employed as a lead carman. In the final analysis, there was no appropriate direct supervision over the Plaintiff by

the Defendant. Any supervision would be described as haphazard at best.

Thus, at trial the Plaintiff was able to prove that:

1. The Defendant had failed to train the Plaintiff in anyway the operation of the valves in question;

2. The Defendant had installed this valve in approximately 1981, and had failed at anytime after that to inspect the valve or repair it;

3. The Defendant had a responsibility to properly train its employees;

4. The Defendant had a duty to inspect and maintain its equipment;

5. The Defendant's employee in charge of inspection and maintenance of this valve worked at a yard two hundred (200) miles away;

6. The Plaintiff's immediate supervisor worked at the same yard two hundred (200) miles away;

7. The valve malfunctioned by being sticky and difficult to turn according to all employees who testified at trial; and

8. The Plaintiff suffered serious, permanent injury to his back when the valve failed while he was attempting to operate it.

In summary, the Plaintiff proved ample grounds of negligence on the part of the Defendant and the trial court's ruling setting the jury verdict aside does not comport with the Law. It has long been held in FELA cases where questions of the Defendants' negligence exist, the decision should be left to the jury. Bailey v. Central V.R., Inc., (1943) 319 US 350, 87 L.Ed. 1444, 62 S.Ct. 1062.

It is for the jury to determine whether or not, under FELA, an employer's conduct measures up to reasonable standards under the circumstances. Wilkerson v. McCarthy, (1949) 336 US 53, 93 L.Ed. 497, 69 S.Ct. 413.

Where the proof justifies a conclusion that the employer's negligence played some part in producing the injuries for which damages are sought, a jury question is presented on the issue of causation. Rogers v. Missouri P.R. Company, (1957) 352 US 500, 1 L.Ed.2d 493, 77 S.Ct. 443.

The issue of proximate cause must go to the jury if there is substantial evidence that a violation of FELA is a contributing proximate cause of injury. St. Louis S.R. Company vs. Ferguson, (1950 CA 8 Mo) 182 F2d 949.

The railroad has a duty to make reasonable inspections of its premises in order to discover and repair any defects therein. Webb v. Illinois C R. Company, (1957) 352 US 512, 1 L.Ed.2d 503, 77 S.Ct. 451. It is a jury issue whether or not the Defendant has been negligent in failing to properly inspect. Shelton v. Thomson, (1946 CA 7 ILL), 157 F2d. 709; (Alabama and V. R. Company v. Fountain, (1927), 145 MISS 515, 111 So. 153, Cert.den. 274 US 759, 71 L.Ed. 1338, 47 S.Ct. 769).

It is for the jury to determine whether or not under FELA the Defendant had knowledge, actual or constructive, of alleged inadequacies of equipment which caused the injury. Urie v. Thompson, (1949) 337 US 163, 93 L.Ed. 1282, 69 S.Ct. 1018.

In the case below the decision was entered based on a question of Law rather than fact and thus, this Court has jurisdiction to grant a Writ of Certiorari. Union P.R. Company v. Huxol, (1918), 245 U.S. 535, 62 L.Ed. 455, 38 S.Ct. 187; Chicago, M & S P.R. Company vs. Coogan, (1926), 271 U.S. 472, 70 L.Ed. 1041, 46 S.Ct. 564.

In passing upon a motion for directed verdict or judgment N.O.V., a trial may grant such a motion only upon grounds which would sustain a Motion for Directed Verdict. Dickerson v. Franklin N.A.T. Ins. Company, (1942 CA 4 W.Va), 130 F2d. 35.

A trial judge may grant judgment in N.O.V. only where as a matter of Law the evidence is insufficient to sustain a Claim. National Car Rental System, Inc., v. Better Monkey Grip Company, (1975 CA 5 Tx) 511 F.2d 724 cert.den. 423 U.S. 894, 46 L.Ed. 2d 126 96 S.Ct. 193.

Judgment N.O.V. will only be granted where there is such complete absence of evidence to support a verdict that jury's findings could only be a result of shear summarize and conjecture. Howes v. Great Lake Press Corp., (1982, Ca.2 NY) 679 F2d. 1023.

A trial court should only deny a Motion for Judgment N.O.V. where evidence along with all inferences to be reasonably drawn therefrom when viewed in a light most favorable to party opposing such motion is such that reasonable men in fair and impartial exercise of their judgement may reach different conclusions. Sparrow v. Yellow Cab Company, (1959, CA 7 Ill) 273 F2d. 1.

CONCLUSION

The trial court erred in supplanting its view of the evidence for the findings of the jury in the cause. The Plaintiff/Petitioner, Oscar Lee Wilkins, is entitled to recover his judgment from the Defendant/ Respondent, Burlington Northern Railroad Company, in the amount of FOUR HUNDRED SEVENTY-FIVE THOUSAND AND NO/100 ($475,000.00) DOLLARS. The Plaintiff/ Petitioner, Oscar Lee Wilkins, respectfully requests this Court grant this Petition for Writ of Certiorari and enter such further orders as may be appropriate.

Respectfully submitted,

/s/ JAMES F. SCHAEFFER, JR.
Counsel of Record for Plaintiff/Petitioner
5108 Stage Road, Suite 2
Memphis, Tennessee 38134
(901) 382-1212

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was served upon the following by U.S. Mail postage prepaid:

Clerk of the Court
United States Supreme Court
One First Street, Northeast
Washington, D.C. 20543

Honorable Robert P. Gaines
BEGGS & LANE
Blount Building, Seventh Floor
Pensacola, Florida 32501

DONE, this 5th day of November, 1992.
/s/ JAMES F. SCHAEFFER, JR.

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF ESCAMBIA COUNTY, FLORIDA

OSCAR LEE WILKINS,
Plaintiff,

v.

Case No. 88-2604
Division A

BURLINGTON NORTHERN RAILROAD COMPANY, a foreign corporation,
Defendant.

FINAL JUDGMENT FOR DEFENDANT

At the trial of this cause the court took under advisement the motion for directed verdict made by the defendant at the close of the plaintiff's evidence and again after all evidence had been presented. The court has received written argument and has heard oral argument from counsel for the parties on that motion. The court is aware of the rule exemplified by such cases as Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443 (1957) that it is not necessary for a plaintiff bringing suit under the Federal Employers Liability Act to establish that negligence on the part of the railroad was the proximate cause of his injury. Rather, the burden on the railroad employee is to prove that negligence of the employer played any part, however small, in the injury. However, neither that case nor any subsequent case has eliminated the requirement that the plaintiff present evidence from which fair-minded jurors could reasonably conclude that there was negligence on the part of the employer that played a part in causing the injury. The cases have not repealed the rule that it is necessary for injury to be reasonably foreseeable from the conditions in order for a case of negligence to be made.

In this case the undisputed evidence was that no supervisory employee of the plaintiff had instructed him to use the method that he was attempting to use to increase the flow of fuel through the supply hose. His supervisor testified that he never touched the valve that the plaintiff was attempting to turn when he sustained his injury. The water service mechanic who installed and maintained

the pumping system testified that the valves that the plaintiff had turned and was turning at the time of his injury had no effect on the flow of fuel through the small hose.

It being undisputed that the plaintiff had not been instructed by any supervisor to use the method that he was using, that he was aware of the appropriate method and that there was no reason for any supervisory personnel to expect the plaintiff to attempt to turn the valve in question, it is the conclusion of the court that there was no evidence from which a reasonable jury could conclude the negligence of the defendant played a part in causing the plaintiff's injury. The court therefore concludes that the defendant's motion for directed verdict should have been granted. Therefore, it is.

ORDERED that the motion of defendant for directed verdict taken under advisement at trial is hereby granted, that plaintiff take nothing by his suit against defendant and that defendant do have and recover of and from plaintiff its taxable costs to be entered by further order of the court.

DONE AND ORDERED at Pensacola, Florida, on 25 June, 1991.

/s/ L. A. Collier
CIRCUIT JUDGE

Copy furnished to
Gerald A. McGill, Esquire;
Eugene Williams, Esquire; and
Robert P. Gaines, Esquire

APPENDIX B

MANDATE

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, the Judges of the Circuit Court for Escambia County

WHEREAS, in that certain cause filed in this Court styled:

OSCAR LEE WILKINS

v. Case No. 91-2223

BURLINGTON NORTHERN RAILROAD COMPANY, a foreign corporation Your Case No. 88-2604

The attached opinion was rendered on June 1, 1992

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

WITNESS the Honorable James E. Joanos

Chief Judge of the District Court of Appeal of Florida, First District and the Seal of said court at Tallahassee, the Capitol, on this 20th day of July, 1992.

/s/ Karen Roberts

Deputy Clerk, District Court of Appeal of Florida, First District

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

OSCAR LEE WILKINS,
Appellant,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,
a foreign corporation,
Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 91-2223.

Opinion filed June 1, 1992.

Appeal from the Circuit Court for Escambia County.
Judge Lacey Collier.

Gerald A. McGill, of McGill & McDavid, Pensacola, and Eugene Williams of Williams & Miller, Memphis, Tennessee, for appellant.

Robert P. Gaines, of Beggs & Lane, Pensacola, for appellee.

PER CURIAM.

BOOTH, BARFIELD, and KAHN, JJ., CONCUR.

APPENDIX C

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904) 488-6151

July 2, 1992

CASE NO: 91-02223

L.T. CASE NO. 88-2604-CA-01

Oscar Lee Wilkins, v. Burlington Northern Railroad Company

Appellant(s) Appellee(s).

ORDER

Motion for rehearing, filed June 15, 1992, is DENIED.

By order of the Court

JON WHEELER
CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Gerald A. McGill

Robert P. Gaines

/s/ Laurie Black
Deputy Clerk